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Right to Work Laws and Taft-Hartley - Effect upon the Agency Shop

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RIGHT TO WORK LAWS AND TAFT-HARTLEY —EFFECT UPON THE AGENCY SHOP

I. INTRODUCTION

During the growth of organized labor, various forms of union security agreements have gained prominence in the field of labor-management relations. Despite the outcries of "free choice for the workingman", advocates of these systems have stressed freedom of association and the right of the majority to speak for the whole.[1] The closed shop, which was the most popular of these agreements prior to 1947, conditioned employment upon union membership and no hiring was done of any laborer who did not first obtain a union card.[2] Under the Wagner Act,[3] these agreements were permitted; however, with the enactment of the Taft-Hartley proposal, unionism in the closed shop category was abolished.[4] As a result of this enactment the union shop, expressly provided for in Taft-Hartley,[5] came into the limelight since the arrangement does not necessitate membership as a prior condition for work, but forces the employee to attain membership after thirty days as a condition of continued employment.

The agency shop is an arrangement whereby non-union employees, working in an establishment where a union has been named exclusive bargaining agent, are assessed by contract a fixed sum to defray costs expended by the union in representing such non-members.[6] The agency Shop provision has been referred to as the "support money clause", the "Rand Formula" and the "bargaining agent fee".[7] Although Taft - Hartley is silent, recent interpretation[8] has declared the agency shop a permissive scheme between employer and employee, much the same as it was under the

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1. See generally Sultan, **Historical Antecedents to the Right-to-Work Controversy,** 31 So. Cal. L. Rev. 221 (1958).
2. See Millis and Katz, **A Decade of State Labor Legislation 1937-1947,** 15 U. Chi. L. Rev. 282 (1948).
3. National Labor Relations Act, 49 Stat. 452 (1935).
4. 61 Stat. 140 (1947), 29 U.S.C.A. § 158 (1956).
5. **Ibid.**
6. See Jones, **The Agency Shop,** 10 Lab. L.J. 781 (1959).
7. **Ibid.**
8. NLRB v. General Motors Corp., 371 U.S. 908 (1963).

Wagner Act.[9] The proponents of this system stress the need for elimination of the "free rider", i.e. the employee who accepts the benefits of the bargainer but who is unwilling to assume any of the financial burden of supporting the union. The full impact of the agency shop upon the working mass is realized when the provision encounters a state having right to work legislation that supposedly guarantees laboring freedom to its residents.[10]

II. THE EFFECT OF TAFT-HARTLEY UPON RIGHT TO WORK LEGISLATION

Under section 14(b) of the Labor Management Relations Act of 1947,[11] Congress granted to the states the power to outlaw union shop agreements by stating:

> Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.[12]

Some states had adopted right to work statutes prior to this enactment. This section served as a stimulus for others to enact such legislation since section 14(b) takes precedent over section 8(a) (1) and 8(a) (3) of the same act which states in relevant parts:

> It shall be an unfair labor practice for an employer
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> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 (rights of employees);
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> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; *PROVIDED*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement

> whichever is the later, . . . *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization . . . (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership, . . . [13]

At present there are twenty states with right to work statutes, constitutional amendments, or both, designed to prohibit compulsory unionism.[14] The constitutionality of these right to work statutes was upheld by the Supreme Court of the United States in 1949 when they passed upon the validity of Arizona[15] and North Carolina statutes.[16] The phraseology of the statutes in eight of these right to work jurisdictions[17] varies but generally reads:

> The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer.[18]

Unions, in an attempt to circumvent the statutes, have used the strict interpretation sometimes given to the phrase "agreements requiring membership"[19] to their advantage and responded with the agency shop clause. This does not

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9. Public Serv. Co. of Colo., 89 NLRB 418 (1950).
10. See Rose, **The Agency Shop v. The Right-to-Work Law**, 9 Lab. L.J. 579 (1958); McConkey, **Was the Agency Shop Prematurely Scrapped**, 9 Lab. L.J. 150 (1958).
11. For text of Act see U.S. Code Cong. Serv., 80th Congress, 1st Sess., 135 (1947). This Act and Taft-Hartley are one and the same and amend the National Labor Relations Act.
12. 61 Stat. 151 (1947), 29 U.S.C.A. 164 (1956).
13. 61 Stat. 140 (1947), 29 U.S.C.A. 158 (1956).
14. **Infra** notes 17 and 19 for listing of statutes and breakdown into categories.
15. American Fed. of Labor v. American S. & D. Co., 335 U.S. 538 (1949).
16. Lincoln Fed. L.U. v. Northwestern I. & M. Co., 335 U.S. 525 (1949).
17. Ariz. Rev. Stat. § 23-1302 (1956); Ariz. Const. art. 25 (1956); Fla. Const. Dec. of Rts. § 12 (1959); Ind. Ann. Stat. § 40-2701 (Supp. 1963); Kan. Const. art. 15 § 12 (G.S. 1961 Supp.); Nev. Rev. Stat. 613.250 (1961); N.D. Cent. Code § 34-01-14 (1960); S.D. Code § 17-1101 (Supp. 1960); Tex. Rev. Civ. Stat. Ann. art. 5154g (1962).
18. Fla. Const. Dec. of Rts. § 12 (1959).
19. See **supra** note 12. (This phrase is found in Section 14(b) of Taft-Hartley).

make actual membership mandatory but does require assessments equal to initiation fees plus dues. Of these twenty states, the remaining twelve have statutes[20] providing further that:

> No employer shall require any person to pay any dues, fees, or other charges of any kind to any labor union, labor organization or any other type of association as a condition of employment or continuation of employment.[21]

This further provision completely precludes the agency shop as well as the union shop. This article is directed at those states whose right to work laws are founded on membership only, thus clouding the basic problem of the "free rider" principle and creating an additional one of statuatory construction.

III. STATE DECISIONS AND THEIR EFFECT

Indiana in 1959 decided the landmark case directly posing the issue of whether an agency shop provision was valid in a right to work jurisdiction.[22] In *Meade Electric Company v. Hagberg*[23] the complaint alleged that Local 697, International Brotherhood of Electrical Workers, which had been certified by the National Labor Relations Board as exclusive bargaining agent for all of the electricians in the motor division of plaintiff company, had attempted to include an agency shop clause in the contract which violated the Indiana right to work statute. The company requested a permanent injunction restraining the defendant from attempting to incorporate such a clause. The Lake Superior Court entered

20. Ala. Code, tit. 26 § 375 (1958); Ark. Const. Amend. 34 (1960); Ark. Stat. Ann. § 81-202 (1960); Ga. Code Ann. § 54-902 (1961); Iowa Code Ann. § 736A.1 (1950); Miss. Code Ann. § 6984.5 (Supp. 1962); Neb. Const. art. 15 § 13 (1956); Neb. Rev. Stat. § 48-217 (Supp. 1961); N.C. Gen. Stat. § 95-78 (1958); S.C. Code § 40-46 (Supp. 1960); Tenn. Code Ann. § 50-208 (1955); Utah Code Ann. § 34-16-2 (Supp. 1963); Va. Code Ann. § 40-68 (1953). In Maryland union shops are contrary to public policy, but the statute merely makes such agreements unenforceable, Md. Ann. Code art. 100 §§ 63-64 (1957).

21. Utah Code Ann. § 34-16-2 (Supp. 1963).

22. Meade Elec. Co. v. Hagberg, 129 Ind. App. 631, 159 N.E.2d 408 (1959). **But see** Arizona Flame Restaurant, Inc. v. Baldwin, 34 L.R.R.M. 2707 (Superior Court, Maricopa County, 1954) **affirmed** and **modified** 82 Ariz. 385, 313 P.2d 759 (1957). The Arizona Supreme Court did not find it necessary to decide the question of whether the agency shop was unlawful, however, the trial court construing the right to work statute held that form of union-security unlawful under Arizona law.

judgment for the union and upon appeal the decision was affirmed.

Judge Kelley in the majority opinion placed special emphasis upon the penalty provision included in the right to work law[24] and reasoned that penal statutes are strictly construed and not enlarged by construction. In the course of his opinion he said:

> The Indiana Right to Work Law is plain and unambiguous, and there is no prohibition against the requirement of the payment of fees or charges to a labor organization. The Indiana Law merely prohibits agreements and conduct which conditions employment on membership in a labor organization.[25]

Strengthening his position, he submitted that had the legislature intended to prohibit the payment of fees they would have explicitly so stated in the statute since Indiana was the nineteenth state to adopt such a law. The crux of the decision turns on the inclusion of the penal provision in the statute as it allows the court to interpret the word membership in its narrowest sense.

This precedent stood unchallenged for a period of almost two years until the Supreme Court of Kansas reached a conflicting conclusion.[26] In the *Higgins* case nonunion employees, covered by a collective bargaining agreement which contained an agency shop provision, sought to enjoin the application of the agreement to prevent their discharge for failure to pay certain charges assessed them by the provision. The union asserted the same line of reasoning should be applied to the construction of Kansas' law that Indiana applied to their statute. However, the right to work enactment here was a constitutional amendment which did not contain a penalty clause[27] as found in the Indiana statute.[28] Using this variation as a guidepost, the court said:

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23. 129 Ind. App. 631, 159 N.E.2d 408 (1959).

24. Ind. Ann. Stat. § 40-2705 (Supp. 1963) which declares that violation of the right to work law is a misdeameanor punishable by fine or imprisonment.

25. Meade Elec. Co. v. Hagberg **supra** note 22, at 413.

26. Higgins v. Cardinal Mfg. Co., 188 Kan. 11, 360 P.2d 456, **cert. denied,** 368 U.S. 829 (1961).

27. Kan. Const. art. 15 § 12 (G.S. 1961 Supp.)

> Here the court is not confronted with a penal statute to be strictly construed, but a remedial constitutional amendment to be liberally construed to effectuate the purpose for which it was adopted.[29]

Reviewing the statutes' legislative history in Kansas, the court investigated the federal decisions involving unions under federal legislation.[30] It was concluded that by the terms of section 8(a) (3) (b) of Taft-Hartley, the authority granted was *not to compel membership* in the union, but merely permitted the unions to require workers to pay dues and initiation fees to support the union. Using this interpretation, union and agency shops become synonomous and the term membership in the right to work law must preclude not only formal membership, but any payment of fees or dues. They felt the alternative definition applied in the Indiana court would declare the constitutional amendment meaningless.

The court also dealt with the problem of whether the granting of injunctive relief was in the exclusive domain of the National Labor Relations Board under the federal pre-emption doctrine.[31] In resolving this issue the court reasoned that since Congress had granted the states authority to enact right to work legislation they must also have given authority to the state courts to process the violation of such laws.

Since the Kansas decision, Nevada[32] and Florida[33] courts have held agency shop agreements to be in violation of their laws. The Nevada case arose in United States District Court. Chief Judge Ross resolved three basic issues in construing Nevada's statute: (1) That section 14(b) of Taft-Hartley gives the states the power to prohibit the agency

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28. **Supra** note 24.

29. Higgins v. Cardinal Mfg. Co., **supra** note 26, at 464.

30. Radio Officers Union v. Labor Board, 347 U.S. 17 (1954); Union Starch & Ref. Co. v. NLRB, 186 F.2d 1008 (7th Cir. 1957) **cert. denied,** 342 U.S. 815 (1951).

31. It is not within the scope of this article to comment on the pre-emption doctrine. For a general discussion of this topic see Cox, **Federalism in the Law of Labor Relations,** 67 Harv. L.Rev. 1297 (1959); Hays, **State Courts and Federal Preemption,** 23 Mo. L.Rev. 373 (1958); Meltzer, **The Supreme Court, Congress, and State Jurisdiction Over Labor Relations,** 59 Colum. L.Rev. 6 (1959).

32. Amalgamated Ass'n v. Las Vegas-Tonopah-Reno Stage Line, 202 F. Supp. 726 (D.Nev. 1962).

33. Schermerhorn v. Local 1625 of Retail Int. Ass'n, 141 So.2d 269 (Fla. 1962).

shop, (2) The agency shop clause is unlawful under Nevada's right to work provision, and (3) The state courts are not pre-empted by the NLRB in granting injunctive relief.

Resolving the first issue, Chief Judge Ross looked to the legislative history of the Taft-Hartley Act and was convinced that there was no distinction between the union security arrangement provided for in section 8 (a) (3) of the Act and the agency shop clause before the bar. By this interpretation the right to work provision can abolish either agreement. As to the second question the court had this to say of the Nevada Attorney General's official opinion:[34]

> The opinion of the Nevada Attorney General has a two-fold significance. First. The Nevada courts will give weight to a construction of a statute by the executive department . . . . We find it difficult to believe that the Legislature was not aware of the construction which had been placed upon the statute . . . . Its acquiescence, viewed either in terms of refusal to repeal or in failing to amend so as to overrule the executive construction (at a time when the subject of union-security agreements was before it), should not be totally ignored.[35]

On the issue of whether or not state courts could, by affirmative action such as an injunction, enforce the state policy against the agency shop, the court looked to the congressional history of section 14 (b) and said that it "removes any lingering doubt that the state cannot only ban union security agreements but may also enforce the state policy".[36]

The Florida Supreme Court in the *Schmerhorn* case[37] hastened to add support to the extinction of the agency shop when they granted an employer injunctive relief from such a provision. In so doing the court declared that their right to work amendment gave the laborer a distinct freedom and said:

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34. Nev. Att'y Gen. Op. 407 (1962) stated: "To give effect to an 'Agency Shop' clause embodied in a collective bargaining agreement would render the Right to Work law nugatory."

35. **Supra** note 32, at 732.

36. For congressional history the court relied primarily upon H.R.Rep. No. 245, 80th Cong., 1st Sess. (1947) and H.R.Rep. No. 510, 80th Cong., 1st Sess. (1947).

37. Schermerhorn v. Local 1625 of Retail Int. Ass'n, **supra** note 33.

> This section clearly bestows on the workingman a right to join or not to join a labor union, as he sees fit, without jeopardizing his job. Inasmuch as the Constitution has granted this right, the agency shop clause is repugnant to the Constitution in that it requires the nonunion employee to purchase from the labor union a right which the Constitution has given him.[38]

The final test came when for the first time the United States Supreme Court granted certiorari on the direct issue of the agency shop and its compatibility with the States' right to work laws.[39] The holding of the court supported Florida's decision by agreeing that section 14(b) allowed the state's substantive law to bar the agency shop arrangement. However, the problem of whether or not the state court have the power to enforce their decision by granting injunctive relief was reserved for a future session.

A review of state decisions indicates a growing tendency to strengthen the right to work statutes, permitting them to preclude complusory unionism regardless of the manner in which the agreements are labeled. With the addition of the *Schermerhorn* case, it appears that the Federal judiciary will support any reasonable state interpretation on the subject.

IV. FEDERAL DECISIONS

The early decisions of the NLRB clearly established the validity of the agency shop under Taft-Hartley. Following a precedent formulated under the Wagner Act in 1950,[40] the Board in *American Seating Company*[41] decided that since the language of the Wagner Act was continued in Taft-Hartley, the legislative history of Taft-Hartley indicated that Congress "intended not to illegalize the practice of obtaining support payments from non-union members who would otherwise be free riders".

The Supreme Court of the United States interpreting the same provision declared in 1954:[42]

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38. **Id.** at 274.
39. Retail Clerk Internat'l Ass'n, Local 1625 v. Schermerhorn, 371 U.S. 909 (1963).
40. Public Serv. of Colo. **supra** note 9.
41. 98 N.L.R.B. 800 (1952).
42. Radio Officers v. Labor Board, **supra** note 30.

> This legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees.[43]

This conclusion had been reached earlier by the Court of Appeals for the Seventh Circuit in the *Union Starch* case.[44] In light of the above statement, what can the term membership actually mean except that union and agency shops are synonomous? This necessarily follows if section 8(a) (3) cannot force membership upon an individual.

Perhaps this question has been settled by the decision handed down by the United States Supreme Court in a highly controversial case involving, but circumventing, the Indiana right to work statute.[45] The case arose shortly after the *Meade* decision when the United Auto Workers requested General Motors to bargain on an agency shop clause to cover the company's plants in Indiana.[46] The company refused and alleged that such an arrangement would violate the Taft-Hartley Act. General Motors further contended "that the first proviso to Section 8(a) (3) spells out the only type of agreement, i.e., an agreement limited to conditioning continued employment upon membership in a labor organization, that may permissibly infringe upon right guaranteed in Section 7[47] and not expose an employer to a violation of Section 8(a) (3)".[48] The union contended that the first proviso to section 8(a) (3) merely defined the outer limits of permissible union-security arrangements, and further that the proviso encompasses lesser forms of unionism such as the agency shop. Both parties agreed that they wanted a decision from the Board which would definitely indicate whether or not an agency shop was legal under Taft-Hartley, thereby eliminating an interpretation of Indiana's right to work law.

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43. **Id.** at 41.
44. Union Starch & Ref. Co. v. NLRB, **supra** note 30.
45. NLRB v. General Motors Corp., 371 U.S. 908 (1963).
46. General Motors Corp., 130 N.L.R.B. 481 (1961).
47. 29 U.S.C.A. § 157 which states: "Employees shall have the right to self-organization, . . . to bargain collectively through representatives of their own choosing, . . . and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."
48. General Motors Corp., **supra** note 46, at 485.

In holding the agreement unlawful by a 3-2 majority, Chairman Leedom in his concurring opinion said:

> To hold the agency shop lawful, one would have to conclude that Congress intended the word "membership" in Sections 7 and 8(a) (3) to encompass not only literal membership, but also other relationships between employees and the union in the picture, while at the same time intending that the same word in section 14(b) encompass only literal membership; or further, that Congress intended the word "membership" to mean one thing in Indiana and a different thing somewhere else. . . . Thus, the conclusion is inescapable that an agency shop arrangement, whatever its status under Indiana law, cannot be lawful under the NLRA in a state like Indiana where employment cannot lawfully be conditioned on literal membership.[49]

The concurring opinion of Board Member Kimball concluded that to allow the union to collect fees from non-union employees deprived such employees of equal rights under the contract since they had no vote in running the organization.

The dissent reasoned in accord with the contentions of the Union in support of the agreement, and relied heavily upon previous interpretation by the NLRB on the subject.

Seven months later the case came up for rehearing and the Board vacated its previous order in a 4-1 decision.[50]

When the case came before the United States Court of Appeals, the court in a per curiam decision construed the agency shop to violate Taft-Hartley[51] thus reinstating the Board's original decision. The court decided that the agency shop and the union shop were two entirely different arrangements; a union shop being premised upon membership in a labor organization and an agency shop on the contrary based upon an employee paying charges rather than becoming a union member as a condition of employment. With this distinction in mind, the court concluded that the exception

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49. **Id.** at 486.

50. General Motors Corp., 133 N.L.R.B. 451 (1961). (Membership on the Board had been changed and this may or may not have had an effect upon the decision).

51. General Motors Corp. v. NLRB, 303 F.2d 428 (6th Cir. 1962).

provided for in section 8(a) (3) means exactly what it says, and excepts from the operation of the law only agreements requiring membership in a labor organization.

This stand taken by the Court of Appeals was reversed when the Supreme Court of the United States held that the agency shop was in fact a form of unionism which is not invalidated by Taft-Hartley.[52] Justice White speaking for the court stated that when used in terms of union security contracts, "*membership* as a condition of employment is whittled down to its financial core". His opinion emphasized that in other contexts there may be a real difference between the union and agency shop, but he stated that any distinction for present purposes would be "more formal than real".

V. NORTH DAKOTA'S POSITION

The right to work law of North Dakota was passed by the legislature on March 13, 1947, and approved on referendum June 29, 1948. The statute reads as follows:

> The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization, and all contracts in negation or abrogation of such rights are hereby declared invalid, void, and unenforceable.[53]

This statute has never been challenged before the Supreme Court of the state as to its effect upon the agency shop.

In 1956 the Attorney General of North Dakota issued an opinion reaffirming a position it took in 1952 in holding the agency shop valid. The opinion in part read:

> We do not think that an agency shop agreement is in violation of the above law. In the first place, the right to work under this agreement is not dependent upon membership . . . in a Union, but is rather a payment of a fee as compensation for representation by the Union. Secondly, the employee enters into the arrangement of his own free will and the payment of the fee entitles him to Union

52. **Supra** note 45.
53. N.D. Cent. Code § 34-01-14 (1961).

> representation without actual membership in the Union.[54]

In 1959 another opinion was rendered which upheld the agency shop.[55] The opinion digested the decision of Indiana and compared the Indiana statute to our own. The office did state, however, that the amount charged of non-members should be based only on their pro-rata share of the cost of bargaining, and the dues and initiation fees required of union members should not be taken into consideration.

The North Dakota Labor-Management Relations Act, enacted in 1961,[56] does nothing to solve the problem of the agency shop because its provisions resemble so closely those of Taft-Hartley. A special committee appointed to investigate the labor law situation in submitting the Act to the legislature had this to say about the agency shop:

> The Committee believes that the desirability or undesirability of this arrangement is a matter for the sound judgment of the Legislative Assembly. The question is logically related to the "right to work law". Due to the fact the "right to work law" is an initiated measure and would require a two-thirds vote for amendment, it was felt the Committee should not recommend changes in this legislation.[57]

Although there has been no official opinion given in our state since 1959, a letter from the Attorney General's office was issued on May 7, 1962 concerning the question.[58] The letter emphasizes the fact that the court, construing the Nevada statute, took judicial notice of the executive department's stand on the issue, and thereby feels that our Attorney General also has the approval of our Legislature because of our Legislature's inaction. Referring to the recent precedent compiled on the agency shop problem the letter states:

> At this time we do not feel that it would be fitting or proper to change our position on this matter

54. (1954-1956) N.D. Att'y Gen. Rep. 74.
55. (1958-1960) N.D. Att'y Gen. Rep. 155.
56. N.D. Cent. Code, ch. 34-12 (Supp. 1961).
57. CRUM, REPORT OF SPECIAL COMMITTEE ON LABOR LAWS, STATE OF NORTH DAKOTA, (1961) at 28.
58. Letter from Vance Hill, Special Assistant to the Attorney General of North Dakota, to R. W. Wheeler, May 7, 1962.

> without a directive from the Legislature or the courts. While there is at present a division of authority on this question, most of the authority taking a viewpoint contrary to the position taken by this office has come about after we issued our initial view on this agency shop question.

By this recent correspondence from the Attorney General's office, we find that North Dakota's position on the agency shop has remained unchanged since 1952.

VI. CONCLUSION

Acknowledging the existence of the Indiana construction, the decisions in this area definitely show that the agency shop is on its way to obsolesence in the right to work jurisdiction. Considering the rehearing pending on the *Schermerhorn* case, the only problem states may have is the granting of injunctive relief, which would be true if the litigation was found to be within the exlusive domain of the NLRB. This turn of events, however, should still lead to the same conclusion.

Basically the decisions have been founded upon construction and interpretation of Taft-Hartley and of state law. Legislative history of both have been examined at length to determine if the "free rider" situation merited attention during the time of enactment, and this is generally found to have been one of the dominant arguments of the pro-union mass.

The status of the agency shop has yet to be officially established in North Dakota, and it appears that this uncertainty will remain until the Supreme Court of the state is called upon to interpret our statute regarding such an agreement. When the time does arise, seemingly our court will have three choices: (1) To follow the precedent established in Indiana and supported by the Attorney General of North Dakota, (2) Accept that portion of the Nevada decision which supports their Attorney General's statutory construction, and base their decision upon executive interpretation thereby assuming a passive role in the problem, (3) Take notice of the rationale behind the decisions in Kansas, Florida and Nevada and invalidate such a clause.

Although the principle underlying the elimination of the "free rider" is a sound one, it is submitted that the third choice is the best. To the laborer in a right to work jurisdiction, the agency shop is nothing more than a misnomer since its only function is to operate as a union shop. North Dakota by its adoption of a Labor Management Relations Act clearly showed that it meant to keep the union shop invalid.[59] To accomplish this purpose, this writer further submits, the term membership should not be defined on a literal basis as the Attorney General of the State has done in the past but should carry with it the implied meaning of assessments. This construction will make the union and agency shop synonomous. If this is done the agency shop will fall and North Dakota will truly become a right to work jurisdiction as it has chosen to be.

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59. See N.D. Cent. Code § 34-12-02 (Supp. 1961) which is modeled after Section 7 of the Taft-Hartley Act but does not leave open the possibility of a union shop agreement.